United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room E-1712
Sacramento, California 95825-1890

IN REPLY
REFER TO:

October 26, 2005

Mr. Jason Cooper, District Chief
Att: Chairman of the Board
Meridian Fire Protection District
1100 Third Street
Meridian, CA 95957

Mr. Jim Stevens
Treasurer-Tax Collector
County of Sutter
463 Second Street, Room 112
Yuba City, CA 95991

Subject: Tax Area 62-055 Assessment No. 5261 for Assessors Parcel No. 08-130-013;
Tax Area 61-055 Assessment No. 5261 for Assessors Parcel No. 08-130-014;
Certificate of Delinquency of Personal Property Tax and Notice of Involuntary Lien

Dear Mr. Cooper and Mr. Stevens:

We are in receipt of the subject tax assessments and notice of lien for units of the Butte Sink Wildlife Management Area, which is a component of the Sacramento National Wildlife Refuge Complex within the Fish and Wildlife Service, an agency of the United States Department of the Interior. Upon inquiry, we were informed that this tax is an assessment levied by the Meridian Fire Protection District, and were provided with a copy of an "Engineer's Report Proposing Fire Suppression Assessment for the Meridian Fire Protection District." As set forth below, the United States is prohibited from paying the subject Assessments and is not subject to lien. However, as described below, the Federal government may pay legitimate fees for specific services. Accordingly, payment for specific fire services provided by the District may be provided, and may be accomplished through means such as a Memorandum of Understanding.

The Engineer's Report dated June 22, 2001, indicates the report was prepared pursuant to Section 50078 of the California Government Code and Article XIII D of the California Constitution. Section 50078 of the California Government Code specifically applies only to a State or local agency, unlike California Constitution Article XIII D which provides that it also applies to the United States. Article XXIII D limits the imposition of taxes, assessments and fees on property owners, and allows assessments to be levied on property owners only where the assessment is a levy or charge for a special benefit conferred upon the real property. A "special benefit" is defined under § 2 as a "particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large". Under § 4, parcels within a district that are used by the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefits. The burden is on the agency levying an assessment to demonstrate that the property in question receives a special benefit over and above the benefit conferred on

the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property in question.

Article XIII D § 6 describes procedures for levying fees and charges, as opposed to assessments, and indicates, under subsection 4, that no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question and fees or charges based on potential or future use of a service are not permitted. Subsection 5 specifically limits the imposition of fees and charges:

> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

The limitations on the imposition of assessments and fees in California Constitution Article XIII D are consistent with U.S. Constitution Article VI, cl. 2, commonly known as the Supremacy Clause, which prohibits the United States from paying state taxes, as well as U.S. Constitution Article I §8, cl. 17, the Plenary Powers Clause. *See McCulloch v. Maryland*, 4 Wheat 316, 406 (1819) (establishing that the Constitution and the laws made in pursuance thereof are supreme and control the laws of the respective states and cannot be controlled by them). Although states are also protected by sovereign immunity, federal tax immunity is greater than state tax immunity. *See s. Carolina v. Baker*, 485 U.S. 505, 523 (1988) (holding that some nondiscriminatory federal taxes can be collected directly from states even though a parallel state tax could not be collected directly from the Federal government). This heightened standard of immunity for the Federal government counters an imbalance in the federal-state structure whereupon all the people of the states have representation at the federal level, but all the people of the nation are not represented in particular states. *See id.* at 518 n. 11. A heightened standard of federal immunity implies a duty on the part of federal entities to guard against waiving federal immunity in order to prevent efforts by any single state to raid the federal fisc. *See State of Maine v. Dept. of Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992) (noting that state regulatory fees induce "fears of unjustified raids on the federal treasury . . . or attempts to discourage federal activity within their borders").[1]

Where an assessment or fee is not appropriately limited, it is in the nature of a tax, rather than a legitimate fee that may appropriately be paid by the United States. Whereas a tax may be levied by a legislature without regard to benefits bestowed by the government and based solely on ability to pay or property or income, a fee is incident to a benefit bestowed by a public agency performing a service that is not shared by other members of society. A fee is incident to a voluntary act such as a request that a public agency permit the practice of medicine, the construction of a home, or running a broadcast station. *National Cable Television*, 415 U.S. 336,

[1] *Correspondence and memorandum from Regional Solicitor to State Water Resources Control Board*, April 28, 2005.

340-41 (1974). In *Massachusetts v. United States*, 435 U.S. 444, 464-67 (1978), the Supreme Court established a three-prong test for distinguishing a legitimate fee from an impermissible tax, wherein the charge must: (1) be imposed in a nondiscriminatory manner; (2) represent a fair approximation of the benefit received by the payer; and (3) be structured to produce revenues that will not exceed the regulator's total cost of providing the benefits supplied.[2]

The Engineer's Report that was prepared for the Meridian Fire Protection District, at Part C, distinguishes general benefits, which are defined in the report as "services to the community at large", from special benefits, which are defined in the report as those which "confer a service to parcels of real property and to the personal property thereon, and in some cases to adjacent properties." Fire services for property described in the Engineer's Report as subject to special benefits include services for structural, dumpster, vegetation, vehicle, and other property-related fires. However, these types of fires occur throughout the District, so no "particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large" is conferred in delivering these services. Therefore, the description of property subject to special benefits in the Engineer's Report is contrary to the requirements of California Constitution Article XIII D, which defines special benefits as those which confer a "particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." Moreover, these general government fire services are available in substantially the same manner to both property owners and non-property owners, so no fee or charge may be imposed in accordance with Article XIII D §6(5).

As noted previously, a tax is levied by a legislature without regard to the benefits bestowed while a fee is incident to a benefit bestowed by a public agency performing a service that is not shared by other members of a society. Consistent with this approach, § 6(4) of Article XIII D provides that no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. This, in turn, is consistent with the Supreme Court case of *United States v. Massachusetts, supra*, which established that while the United States is prohibited from paying a general tax, certain fees may be paid where the fees represent a fair approximation of the benefit received. Fees imposed annually on the basis of property size have been held by courts to be taxes from which the United States is immune. *See United States v. Harford County, Md.*, 572 F. Supp. 239, 241 (1983) (holding that front-foot assessment for financing of county water and sewer construction projects is a tax from which the federal government is immune); *United States v. City of Huntington*, 999 F. 2d 71, 73 (4th Cir. 1993) (holding that a municipal service fee imposed on the basis of square footage of buildings to cover fire and flood protection and street maintenance is a tax from which the U.S. government is immune). Likewise, fees for fire services provided to the general community have been held to be inappropriate violations of United States immunity from taxation. *Novato Fire*

[2] *See Correspondence and memorandum from Regional Solicitor to State Water Resources Control Board*, April 28, 2005.

Protection District v. United States, 181 F.3d 1135. *cert. den.* 529 U.S. 1129.

In *Novato Fire Protection District v. United States*, *supra*, the Novato Fire Protection District Board voted to detach property owned by the Navy from the District's service area in order to provide fire protection services on a contractual basis and avoid the possibility that the contract might constitute an impermissible tax on the Federal government for fire service. The 9th Circuit determined that "when the District assessed a fee equivalent to a theoretical property tax as a condition for providing fire and emergency medical services, its actions clearly ran afoul of the Supremacy Clause", and specifically held:

> When analyzing whether a fee constitutes an impermissible tax, 'we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930). When the fee imposed on the United States for the purpose of extracting by fee that which cannot be extracted by taxation, the imposition of that fee may violate the Supremacy Clause. *See United States v. City of Huntington*, 999 F. 2d 71, 73 (4th Cir. 1993).

Novato at 1138-39. The 9th Circuit observed that its holding did not preclude payment of reasonable fees by the United States that are related to the cost of government services provided. However, the fees charged by the Novato Fire Protection District in exchange for continued fire and emergency medical protection were based not on the actual cost of services provided but rather on the value of the property in question. Such a flat fee, the court held, is an impermissible tax that cannot be paid by the United States. Moreover, the court noted, the Fourth Circuit has concluded that fire protection is a core government service for which a municipality could not charge the United States: "Otherwise 'virtually all of what are now considered taxes could be transmitted into user fees by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g. a police fee." *Novato* at 1139, *citing to Folio v. City of Clarksburg*, 134 F.3d 1211, 1217 (4th Cir. 1998); *City of Cincinnati v. United States, 39* Fed. Cl. 271, 275-76 (Fed.Cl.1997), *aff'd by* 153 F.3d 1375 (Fed. Cir. 1998).

Although the 9th Circuit and other courts have determined that the Federal government is prohibited from paying charges for fire services that are not based on the actual cost of the service provided, fire districts may nevertheless be reimbursed by the Federal government for services. Federal law at 15 U.S.C. §2210 provides for the reimbursement of costs for firefighting on Federal property:

> Each fire service that engages in the fighting of a fire on property which is under the jurisdiction of the United States may file a claim with the Administrator for the amount of direct expenses and direct losses incurred by such fire service as a result of fighting such fire.

15 U.S.C. § 2210 (a). In paying these claims, an agency must determine whether the United

States has already paid for the fire services and whether the fire district incurred additional firefighting costs over and above its normal operating costs in connection with the fire. Claims filed pursuant to 15 U.S.C. § 2210 are forwarded to the Secretary of the Treasury for payment.

In conclusion, for the reasons set forth above, the United States is prohibited from paying the subject Assessments. In addition, for reasons arising from the Supremacy Clause, United States property is not subject to lien.[3] However, as noted, the Federal government may pay legitimate fees for specific services. Accordingly, payment for specific fire services may be provided, and may be accomplished through means such as a Memorandum of Understanding. United States National Wildlife Refuges may reimburse fire districts for fire fighting services in accordance with procedures established in Memoranda of Understanding (MOUs) with local fire districts. These MOUs may specify that a refuge will pay a district for actual fire suppression costs incurred by the district while suppressing fires on refuge lands.

Should you have further questions, please contact Karen Koch in the Office of the Regional Solicitor at 916-978-5687.

Sincerely,

Daniel G. Shillito
Regional Solicitor

By: Karen D. Koch
Assistant Regional Solicitor

Enclosure

cc: K. McDermond, FWS CNO Deputy Manager
M. Kolar, FWS CNO Assistant Manager
S. Dyer, FWS CNO Realty Officer
G. Austin, FWS CNO Assistant Refuge Supervisor
K. Foerster, FWS Sacramento National Wildlife Refuge Manager
P. Grissom, FWS SNWR Fire Management Officer
M. Peters, FWS Assistant Refuge Manager

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[3] *See e.g. J.W. Bateson Co., Inc. Et al. V. United States*, 434 U.S. 586, 596 n.2 (1978) (requiring payment of bonds by contractors pursuant to the Miller Act to protect laborers who may not otherwise file liens on U.S. property: "the purpose of the [Miller] Act had been explained in the House Report: 'Your committee has fully considered the above bill, and find that there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary to allow mechanics' or material-men's liens on public buildings or public works . . . .'")